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No. 87-1902

In The
Supreme Court of the United States
October Term, 1987

ALLIED-GENERAL NUCLEAR SERVICES, ALLIED CHEMICAL NUCLEAR PRODUCTS, INC., and VALLEY PINES ASSOCIATES,

Petitioners,

v.

UNITED STATES,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER, ALLIED-GENERAL NUCLEAR SERVICES, ET AL.

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INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule No. 36, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of the petitioners, Allied-General Nuclear Services, *et al.* (Allied-General). Written consent to the

filing of this brief has been granted by counsel for all parties. Copies have been lodged with the Clerk of the Court.

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. Policy is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. PLF's Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community. PLF's Board has authorized the filing of an amicus curiae brief in this matter.

Amicus seeks here to augment the argument in the petition for writ of certiorari. It is believed that PLF's public policy perspective and litigation experience in support of private property rights will provide an additional viewpoint with respect to the constitutional issues presented. PLF has participated in numerous cases involving issues arising under the Takings and Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution.

The opinion below holds that governmental actions which advance legitimate police power objectives are, for this reason alone, insulated from Fifth Amendment taking claims. Under this decision, it is difficult, if not impossible, to imagine any situation involving a regulation designed to achieve a governmental purpose which could be said to constitute a taking. Amicus believes the ruling below poses a serious threat to the integrity of private property rights by violating the constitutional prohibition against the taking of property without just compensation.

STATEMENT OF THE CASE

This case involves important constitutional principles relating to governmental powers and private property rights. On one hand, the "police" or "regulatory" power enables government to secure and promote the public good. However, regulation for the public good is often achieved at great expense to individual property owners. The constitution seeks to balance the competing public and private interests by requiring payment of compensation whenever the governmental action results in a taking.[1] The opinion below ignores and undermines this constitutional balance.

Allied-General seeks compensation for the regulatory taking of the Barnwell Nuclear Fuel Plant (Barnwell Plant). The basis for the takings claim is that various United States government "inducements" had encouraged Allied-General to apply for a construction license from the Nuclear Regulatory Commission (NRC) and spend approximately $200 million building the plant. The federal government's actions created reasonable investment-backed expectations that a properly constructed plant would be allowed to operate. These expectations were not realized because the United States refused to grant an operating license after construction was completed. Apparently, President Carter believed that allowing operation of the Barnwell Plant would be inconsistent with efforts to control nuclear proliferation in other countries. Therefore, from 1977 to 1981 a freeze on the processing of the Barnwell operating license was in effect. Although the freeze was lifted in 1981 by President Reagan, the NRC and the

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[1] "[N]or shall private property be taken for public use, without just compensation." U. S. Const. Amend. V, § 1.

Department of Energy have not revived consideration of the operating license application. The plant continues to sit idle with no potential economically viable use.[2]

The opinion below does not address the takings claim by inquiring whether Allied-General has been subject to undue interference with reasonable investment-backed expectations or whether all economically viable use of the property has been denied. Rather, the Court of Appeals focuses on the public purpose served by denying the operating license. In so doing, the Court of Appeals interprets *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. —, 94 L. Ed. 2d 472 (1987), as resurrecting the rule from the century old police power case of *Mugler v. Kansas*, 123 U.S. 623 (1887). *Mugler* was held to be dispositive of Allied-General's takings claim. The opinion below states:

> "A major constitutional holding in its day, [the] authority [of *Mugler v. Kansas*] had been thought impaired by later cases and particularly by *Pennsylvania Coal Co. v. Mahon*. . . . The 1887 Supreme Court held that state action under its 'police power' to protect the 'public health, the public morals, and the public safety,' cannot be a taking. . . .
>
> "Now in *Keystone Bituminous Coal Ass'n v. DeBenedictis* . . . the Supreme Court has dusted off *Mugler* and put it back on its pedestal, while reducing *Pennsylvania Coal Co. v. Mahon* as a precedent pretty much to its own peculiar facts." *Allied-General Nuclear Services v. United States*, 839 F.2d 1572, 1576 (Fed. Cir. 1988), appendix to petition (App.) at 8a-9a.

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[2] For a complete statement of the facts see the petitioners' statement (petition at 2-10) and the opinion below (appendix to petition at 1a-6a).

Thus, the Court of Appeals interprets *Keystone Coal* as establishing in the current law a broad exception to the Takings Clause whenever the government action involves an exercise of the police power. Such an exception virtually eliminates the Fifth Amendment as an effective tool for protecting private property rights from police power abridgment. As even the Court of Appeals below noted: "The rule of *Mugler* is drastic indeed." *Id.* at 1576, App. at 8a.

This amicus brief is limited to the first issue presented by petitioners, *i.e.*, whether the Court of Appeals incorrectly applied a police power exception to bar compensation even though the government action allegedly denies all economically viable use of the property and interferes with reasonable investment-backed expectations.

SUMMARY OF ARGUMENT

The Court of Appeals for the Federal Circuit has decided that a valid exercise of the police power cannot be the subject of a takings claim. The basis for this ruling is this Court's decision last term in *Keystone Coal*. Amicus contends that the Court of Appeals' interpretation of *Keystone Coal* is incorrect and in direct conflict with takings jurisprudence recognizing that even an otherwise valid police power regulation can go too far and result in a taking. The recent Supreme Court decisions in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. —, 96 L. Ed. 2d 250 (1987), and *Nollan v. California Coastal Commission*,

483 U.S. —, 97 L. Ed. 2d 677 (1987), strongly support the concept that police power regulations may result in a taking. Accordingly, the Court of Appeals' interpretation of *Keystone Coal* is clearly wrong. This Court should grant the petition for writ of certiorari so as to clarify the meaning of *Keystone Coal* regarding any police power exception to the Takings Clause. This is a significant national issue which has generated conflicting views among the federal circuit courts and state supreme courts.

REASONS FOR GRANTING THE PETITION

I

THE COURT OF APPEALS' DECISION RECOGNIZING A POLICE POWER EXCEPTION TO THE TAKINGS ANALYSIS IS IN DIRECT CONFLICT WITH SUPREME COURT PRECEDENT AND ESTABLISHED TAKINGS CLAUSE JURISPRUDENCE

Amicus respectfully urges this Court to address and clarify the role played by the public purpose underlying governmental actions in the regulatory taking analysis. The Court's opinion last term in *Keystone Coal* has generated substantial disagreement and conflicting law among the federal circuits as well as in the state courts as to whether the police power authority to enact safety regulations insulates the responsible governmental entity from takings claims. The opinion of the Court of Appeals below is among those interpreting *Keystone Coal* as meaning that otherwise legitimate police power regulations cannot, as a matter of law, effect a taking. This position

stands in sharp contrast to other circuit and state court decisions and the established regulatory takings jurisprudence of this Court.

A. Regulatory Takings Jurisprudence

A century ago, this Court established in *Mugler v. Kansas* that all property is held under the implied obligation that the owner's use of it shall not be injurious to the community. *Mugler,* 123 U.S. at 665. Therefore, prohibiting noxious uses of property is a valid exercise of the police power. *Id.* at 666-67. Accordingly, the Court decided in *Mugler* that prohibiting operation of a distillery was a proper exercise of the police power. *Id.* The second issue decided was the takings claim. Given that there was a valid exercise of the police power, the question presented was whether the prohibition constituted a taking under eminent domain principles. On this issue, the Court held that no taking could result from police power restrictions of private property use. *Id.* at 668-69. An exercise of the police power was viewed as different in principle from an exercise of the eminent domain power and therefore a land use regulation, regardless of its impact on the owner, could not be a taking.[3]

> "As already stated, the present case must be governed by principles that do not involve the power of eminent domain, in the exercise of which property may not be taken for public use without compensation. A prohibition simply upon the use of property

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[3] For an excellent review describing the development of the *Mugler* distinction between police power restrictions and Fifth Amendment takings claims, see Bosselman, Callies, and Banta, *The Takings Issue* 106-23 (1973).

> for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit." *Id.* at 668-69.

The *Mugler* rationale was followed in numerous turn of the century cases to uphold police power regulations and reject takings claims even though the landowner suffered drastic reductions in value and limitations of use.[4]

The Supreme Court substantially changed the takings analysis in 1922 when Justice Holmes established that an otherwise valid police power regulation can go "too far" and result in a taking. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). Justice Brandeis, in dissent, recognized the Court's break from the *Mugler* decision. *Id.* at 417-18 (Brandeis, J., dissenting).

Pennsylvania Coal marks the beginning of modern regulatory takings jurisprudence. Under the now well-established regulatory takings doctrine, the relevance of *Mugler* should be limited to the accepted proposition that

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[4] *See, e.g., California Reduction Co. v. Sanitary Reduction Works*, 199 U.S. 306 (1905). The Court stated in *California Reduction*:

> "'[T]he clause prohibiting the taking of private property without compensation is not intended as a limitation . . . of those police powers which are necessary to the tranquility of every well-ordered community, nor of that general power over private property which is necessary for the orderly existence of all governments. It has always been held that the legislature may make police regulations, although they may interfere with the full enjoyment of private property, and though no compensation is given.'" *Id.* at 324-25.

Perhaps the most well-known case from the *Mugler* era was *Hadachek v. Sebastian*, 239 U.S. 394 (1915).

the police power may be used to regulate injurious uses of property. *Mugler* and the cases following that decision have no relevance to the inquiry under *Pennsylvania Coal* of whether a regulation goes too far and constitutes a taking. Under *Mugler* a use restriction simply could not go too far because the police power was not limited by the Takings Clause. However, the approach since *Pennsylvania Coal* recognizes that the police power is limited by the Takings Clause and compensation is required when otherwise legitimate regulations go too far in abridging property rights.

Agins v. City of Tiburon, 447 U.S. 255 (1980), established the accepted framework for the modern regulatory takings analysis. Under the *Agins* formulation, a land use regulation effects a taking if it fails to substantially advance legitimate governmental interests *or* denies the owner economically viable use of the land. *Id.* at 260. A regulation can be found to effect a taking under either branch of the analysis.

The two-step analysis in *Agins* recognizes first that a regulation must be a valid exercise of the police power. The inquiry analyzes whether the regulation is supported by legitimate public purposes. *Mugler* and other police power cases are relevant to this inquiry. If the regulation fails to substantially advance legitimate government interests, the action is not a valid regulatory measure and the resulting abridgment of property rights is an outright taking of those rights. Last term, in *Nollan v. California Coastal Commission,* 97 L. Ed 2d 677, the Court strongly reaffirmed this first part of the *Agins* formulation. In *Nollan* the Court found that a regulatory action

conditioning a building permit on the dedication of property failed to substantially advance legitimate governmental interests and therefore was not a valid police power regulation but was a taking. *Nollan,* 97 L. Ed. 2d at 687, 689; *see also Penn Central Transportation Co. v. City of New York,* 438 U.S. 104, 127 (1978) (use restriction may constitute a taking if not reasonably necessary to the effectuation of a substantial public purpose); *Wheeler v. City of Pleasant Grove,* 833 F.2d 267 (11th Cir. 1987) (ordinance prohibiting apartment building was arbitrary and bore no substantial relation to legitimate concerns and was therefore a compensable taking).

If the challenged regulation satisfies the first prong of the *Agins* test so that it serves a legitimate regulatory purpose, there is still a need to focus on the economic impact of the regulation. Under this second part of the *Agins* formulation, the inquiry is whether the regulation denies all economically viable use or unduly interferes with reasonable investment-backed expectations. *See, e.g., Keystone Coal,* 94 L. Ed. 2d at 493-501. This part of the *Agins* formulation derives from the *Pennsylvania Coal* "too far" test and each case will turn on its own particular facts. Significantly, a regulation which satisfies the first prong of *Agins* may still result in a taking on this second prong if the impact on the individual's property rights goes too far. Even Justice Brennan's dissent in *Nollan* agrees with this principle. Justice Brennan stated:

> "The fact that the Commission's action is a legitimate exercise of the police power does not, of course,

> insulate it from a takings challenge, for when 'regulation goes too far it will be recognized as a taking.' " *Nollan* 97 L. Ed. 2d at 699 (Brennan, J., dissenting).

The Court of Appeals for the Seventh Circuit perhaps best stated the change in the takings analysis since *Mugler*. That court wrote:

> "Though the Supreme Court has held in past decisions, *Mugler v. Kansas,* that an exercise of the police power may never amount to a taking, the Court has retreated from that principle in more recent decisions. *See San Diego Gas & Electric Co. v. City of San Diego; Agins v. City of Tiburon; Pennsylvania Coal Co. v. Mahon.* Thus, while the Department of Health unquestionably acted under the local police power and while that fact alone might under past precedents justify the conclusion that no taking had occurred, that rationale, standing alone, no longer adequately resolves the issue." *Barbian v. Panagis,* 694 F.2d 476, 485 n.7 (7th Cir. 1982) (citations omitted).

B. The Opinion Below Misconstrues Keystone Coal and Is in Direct Conflict with United States Supreme Court Precedent

The *Keystone Coal* decision expressly applies the *Agins* framework by focusing first on whether the regulation at issue substantially advanced legitimate public purposes and then by turning separately to the economic impact analysis. *Keystone Coal,* 94 L. Ed. 2d at 488. However, in discussing the public purposes for the regulation under the first prong of *Agins,* the *Keystone Coal* opinion has resulted in confusion of the lower courts. The opinion below illustrates how the lower courts have been misled into applying an all-encompassing police power exception to the takings analysis.

The relevance of discussing the public purposes for the state action under the first prong of *Agins* is to determine whether the action is a valid exercise of the police power. However, the language in *Keystone Coal* and the citations to *Mugler* and other pre-*Mahon* cases appear to suggest that if a regulation is supported by valid public purposes so that it substantially advances legitimate objectives, this alone is sufficient to resolve the takings inquiry without next turning to the economic impact analysis. *Keystone Coal*, 94 L. Ed. 2d at 490-93. The dissent in *Keystone Coal* apparently recognized this potential interpretation of the majority opinion and responded by correctly pointing out that a valid public purpose for a regulation does not answer the question of whether a taking has occurred but is merely a prerequisite to the exercise of governmental powers. *Id.* at 505 (Rehnquist, C.J., dissenting).

By interpreting *Keystone Coal* as meaning that valid police power purposes insulate the regulation from a takings claim, the Court of Appeals has returned to the *Mugler* rule that valid restrictions on use of property cannot be a taking. This is completely inconsistent with the Supreme Court's takings jurisprudence since *Pennsylvania Coal*. Only three months after *Keystone Coal* the Court rejected any notions that *Pennsylvania Coal* was no longer good law. In *First Church*, Justice Rehnquist cited *Pennsylvania Coal* as the origin of the established doctrine that a regulation may result in a taking. *First Church*, 96 L. Ed. 2d at 264-65. The dissent, however, continued to push for an exception to the regulatory takings law. Justice Stevens contended that *Keystone Coal* explained

the "rule" that regardless of whether a regulation deprives the owner of property on a permanent or temporary basis, health and safety regulation cannot constitute a taking. *First Church,* 96 L. Ed. 2d 270-71 n.4 (Stevens, J., dissenting). The majority expressly left the issue unresolved, commenting that the case presented no occasion to decide whether the denial of all use can be insulated from the compensation requirement because of the state's authority to enact safety regulations.

Now, in the case presented for the Court's review, the opinion below adopts an interpretation of *Keystone Coal* that recognizes a broad exception to the Takings Clause whenever the regulation is a valid exercise of the police power. The Court of Appeals expressly follows the long abandoned rule from *Mugler* and reduces the relevance of *Pennsylvania Coal* to a precedent limited to its peculiar facts. This decision directly conflicts with the Court's many regulatory takings cases, including *Agins, First Church,* and *Nollan,* and more significantly, effectively eliminates the Fifth Amendment Takings Clause as a limit on police power land use regulation. The Court should now correct the confusion and misinterpretation that its *Keystone Coal* decision is causing and preserve the constitutional protection of property rights intended through the Fifth Amendment Takings Clause.

II

THIS COURT SHOULD NOW CLARIFY WHETHER POLICE POWER ACTIONS FOR HEALTH AND SAFETY PURPOSES ARE INSULATED FROM REGULATORY TAKINGS CLAIMS

Amicus respectfully urges that the Court should now address whether a police power exception to the takings

analysis exists. The issue is of paramount importance to governmental bodies and landowners who must know where the economic burden for regulatory takings will fall. The decision in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles,* 96 L. Ed. 2d 250, establishes that compensation is the required constitutional remedy for regulatory takings; however, a broad police power exception as recognized by the court below would circumvent the *First Church* decision and render the constitutional protection meaningless. The relationship between the police power and the Takings Clause has long been a vexing constitutional issue. The Court should now reject the Federal Circuit's interpretation of a broad police power exception and clarify the scope of any narrower health and safety or nuisance exception that may exist.

The importance for the Court to now clarify the relationship between the police power and the Takings Clause is necessary to correct and prevent other courts from misinterpreting and further confusing the takings jurisprudence. At least one other court has recognized a broad police power exception as being created by *Keystone Coal.* The Washington Supreme Court stated:

> "As we read the *Keystone Coal Ass'n* opinion, exercises of the police power cannot be characterized as a compensable taking whenever the state imposes land use restrictions in order to safeguard the 'public interest in health, the environment, and the fiscal integrity of the area.' This insulation from the takings analysis continues, even if the regulation denies a landowner all economically viable use of the property." *Orion Corp. v. State,* 109 Wash. 2d 621, 654 (1987) (citations omitted).

In contrast, the Pennsylvania Supreme Court has interpreted *Keystone Coal* as an application of the *Agins* formulation. *McClimans v. Board of Supervisors of Shenango Township,* 529 A.2d 562 (Pa. Commw. 1987). The Pennsylvania court added emphasis showing that either prong of *Agins* may be the basis for finding a regulatory taking. *Id.* at 568. The court first found that the regulation prohibiting strip mining in a residential zone was a valid exercise of the police power because it substantially advanced legitimate public purposes. *Id.* There was no taking therefore on that basis. The court next focused on the economic impact of the regulation. Significantly, no police power, health and safety, or nuisance exception was recognized even though the purposes of the regulation were to prevent contamination of drinking water sources and the drifting of toxic smoke.

The Ninth Circuit has also not recognized any police power exception to the takings analysis. The Ninth Circuit recently stated: "Second, even if the government's action is a legitimate exercise of the police power, it is not insulated from a taking challenge. Proof that a regulatory decision 'goes too far' does not require a showing that the decision is arbitrary or irrational." *Herrington v. County of Sonoma,* 834 F.2d 1488, 1498 n.7 (9th Cir. 1987). However, in sharp disagreement with the Ninth Circuit, the Third Circuit views the police power inquiry as controlling in a regulatory takings claim. The Third Circuit recently held that a regulation must fail to satisfy *both* prongs of *Agins* before a regulatory taking can be found. *Empire Kosher Poultry v. Hallowell,* 816 F.2d 907 (3rd Cir. 1987). This means that a valid police power regulation cannot result in a taking. The Third Circuit stated:

> "Thus *Keystone Bituminous* makes clear that to prevail on a regulatory taking claim, a claimant must establish both that the governmental action falls outside the traditional police power, and that the governmental action sufficiently interferes with investment-based expectations.
>
> "The first component of the *Keystone Bituminous* analysis is controlling." *Empire Kosher,* 816 F.2d at 915.

The significant and growing conflict among the circuit courts and state Supreme Courts as to the meaning of *Keystone Coal* and the proper analysis for a takings claim requires direction by the Supreme Court. This divergence even spills over into academia. One legal writer comments that *Pennsylvania Coal* remains vital even after the *Keystone Coal* decision. vonLembke, *Keystone Bituminous Coal Association v. DeBenedictis and the Status of Coal in Pennsylvania,* 111 Harv. J.L. & Pub. Pol'y 227 (1988). Others suggest that *Keystone Coal* has recognized some undetermined nuisance exception to the takings analysis. Peterson, *Land Use Regulatory "Takings" Revisited: The New Supreme Court Approaches,* 39 Hastings L.J. 335, 345 (1988). The conflict created in *Keystone Coal* over whether both prongs of *Agins* must be satisfied was well illustrated by yet another article. Falik and Shimko, *The "Takings" Nexus—The Supreme Court Chooses a New Direction in Land-Use Planning: A View from California,* 39 Hastings L.J. 359, 361-64 (1988). Finally, Professor Epstein suggests that *Keystone Coal* was an aberration which quickly died in *First Church.* Epstein, *Takings: Descent and Resurrection,* Sup. Ct. Rev. 1, 45 (1987). Clearly, the growing disagreement among courts and legal writers as to the significance of *Keystone Coal*

and any police power exception is of broad national concern that warrants this Court's attention.

CONCLUSION

For the reasons stated above, it is respectfully submitted that the petition for writ of certiorari should be granted.

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